

Berns: Comment on Rowan

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COMMENT

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I begin by setting the stage for a question. I then ask it. Put yourself in the position of a delegate to the Constitutional Convention in Philadelphia in 1787. You are an antislavery white person or, perhaps, a black person. Or imagine yourself one of the few black persons eligible to vote for delegates to the state ratifying conventions.¹ Do you, as a delegate, vote for the Constitution? Or, as a voter, do you vote for someone pledged to vote in favor of ratification?

Let us consider a few provisions of the United States Constitution and what they suggest about the expression of equality in the document.

Article I, section 2, clause 3 states:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other persons.²

The clause euphemistically acknowledges the existence of slavery in some of the states. It does not, however, speak of a black person as three-fifths of a person. In fact, to carry out the intent of the clause it would be necessary to count every black as one person and then to multiply the total by three-fifths.

Article IV, section 2, clause 3 states:

No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.³

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1. See generally W. JORDAN, *WHITE OVER BLACK* 126-27, 412-14 (1968) (discussing eighteenth century voting rights of blacks).

2. U.S. CONST. art. I, § 2, cl. 3.

3. *Id.* at art. IV, § 2, cl. 3.

There is no doubt that the "person held to Service or Labour" in this clause refers to a slave. From the records of the Convention, it appears that the majority in the debates insisted on euphemisms within the document such as the one found in this clause, and no one objected to them.⁴ The development of this particular constitutional provision is instructive. First introduced on August 28, 1787, by South Carolinians Pierce Butler and Charles Pinckney, it spoke frankly and brutally of requiring "fugitive slaves and servants to be delivered up like criminals."⁵ After some discussion, this language was withdrawn and replaced by the following version: "If any person bound to service or labor in any of the United States shall escape into another state, he or she . . . shall be delivered up to the person justly claiming their service or labor."⁶ Upon objection to the implication that a person may "justly" claim the services of a slave, or that a person may justly be held as a slave, the Committee of Style revised the provision to read: "shall be delivered up on claim of the party to whom such service or labor may be due."⁷ This version was found objectionable because it began with the words: "No person *legally* held to service or labour in one state."⁸ An unidentified delegate argued that the term "legally" might be understood to favor "the idea that slavery was legal in a moral view."⁹ So the Convention responded by striking the word "legally" and substituting the words "under the laws thereof."¹⁰

As Luther Martin, a member of Maryland's delegation to the Convention, explained the compromise over this constitutional provision to the legislature of his state,¹¹ the delegates "were anxious to avoid the admission of expressions which might be odious in the ears of Americans."¹² Then he added that many of the delegates believed "[t]hat slavery [was] inconsistent with the genius of repub-

4. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 161-62 (R. Ketcham ed. 1986).

5. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 443 (M. Farrand ed. 1937) [hereinafter 2 FARRAND].

6. *Id.* at 453-54.

7. *Id.* at 601-02.

8. *Id.* (emphasis added).

9. *Id.* at 628.

10. *Id.*

11. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 172-232 (M. Farrand ed. 1966) [hereinafter 3 FARRAND]. This particular discussion was presented by Luther Martin in his "Genuine Information" address delivered to the Maryland Legislature on November 29, 1787. See also Reynolds, *Luther Martin, Maryland and the Constitution*, 47 MD. L. REV. 291 (1987).

12. 3 FARRAND, *supra* note 11, at 210.

licanism, and has a tendency to destroy those principles on which it is supported."¹³

Article I, section 9, clause 1 states:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importations, not exceeding ten dollars for each Person.¹⁴

If the persons referred to in this provision are slaves who are imported, then migration must refer to their interstate movement. If this is a correct interpretation of the language, then after January 1, 1808, Congress had the power not only to forbid the further importation of slaves, which it did,¹⁵ but also to prohibit their movement from state to state. In short, after January 1, 1808, Congress had the power to outlaw the interstate slave trade. This view of the clause is supported by another of its provisions. The temporary restriction on Congress' power to regulate foreign and interstate commerce itself was restricted to the states then existing. From the beginning Congress had the power to forbid the migration of slaves to *new* states and to the territories, a power it exercised in the case of some territories.¹⁶ Congress' failure to prohibit the interstate slave trade reflects the political climate of the early nineteenth century. At the time abolishing the interstate slave trade was politically impossible.¹⁷

The conclusion I would draw from the above three provisions is that the Constitution was, to the greatest extent possible, an anti-slavery document. The word slavery does not appear in it, and slavery could have been abolished without changing a word of the original document. The Constitution permitted slavery by not forbidding the states to establish it, but there is no question in my mind

13. *Id.* at 212.

14. U.S. CONST. art. I, § 9, cl. 1. See also Berns, *The Constitution and Migration of Slaves*, 78 YALE L.J. 198 (1968) (addressing this proscription).

15. Act of March 2, 1807, ch. 22, 2 Stat. 426.

16. See, e.g., Act of February 28, 1803, ch. 10, 2 Stat. 205.

17. Luther Martin discussed the political climate in his "Genuine Information" address to the Maryland General Assembly, contained in 3 FARRAND, *supra* note 11, at 172-232. The Eastern States, concerned that the Southern States would lay restrictions on the Navigation Acts, were willing to provide the Southern States with temporary authority to pursue the slave trade in return for an agreement not to lay such restrictions. A committee comprised of one delegate from each State agreed "by a great majority" that the government would not attempt to prohibit the importation of slaves, and that it would omit the restrictive clause relative to the Navigation Acts. *Id.* at 211.

that an explicit attempt to forbid slavery in the states would have precluded the formation of the Union as we know it. It would have led to the rejection of the Constitution in the Southern States where ninety-seven percent of the black persons then resided.

I do not know whether there then would have been a Confederate States of America. I do know what sort of constitution such a confederation would have had: a constitution similar to the one drawn up by the Confederates in 1861. Consider the following statement delivered by Alexander Stephens, vice-president of the so-called Confederate States of America, at Savannah, Georgia, on March 21, 1861:

The prevailing ideas entertained by [Jefferson] and most of the leading statesmen at the time of the formation of the old constitution [*i.e.*, our Constitution], were that the enslavement of the African was in violation of the laws of nature: that it was wrong in principle, socially, morally, and politically. It was an evil that they knew not well how to deal with, but the general opinion of the men of that day was, that somehow or other, in the order of Providence, the institution would be evanescent and pass away. . . . Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. It was a sandy foundation, and the idea of a government built upon it; when the "storm came and the wind blew, it fell."

Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner stone rests upon the great truth that the negro is not equal to the white man. That slavery—subordination to the superior race, is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this physical and moral truth.¹⁸

That is the vice-president of the so-called Confederate States of America speaking in 1861 of the alternative to the Constitution of 1787. It is especially instructive that, like Abraham Lincoln, Stephens understood that the Constitution somehow embodied the principles of the Declaration of Independence. That is precisely why Stephens rejected the Constitution and why Lincoln embraced it. As Lincoln believed, the Declaration of Independence, with its

18. A.H. Stephens, "Corner Stone Speech" at Savannah, Georgia (Mar. 21, 1861), reprinted in H. CLEVELAND, ALEXANDER H. STEPHENS, IN PUBLIC AND PRIVATE WITH LETTERS AND SPEECHES, BEFORE, DURING, AND SINCE THE WAR 721 (1866).

principle of the natural equality of all human beings, is the standard maxim of a free society.¹⁹

Of course, that principle was violated at the beginning. Lincoln knew that, Madison knew that, Hamilton knew that, and Jefferson knew that. Jefferson, for example, knew that blacks also had rights. He said so explicitly.²⁰ He knew that there is no respect in which all men, except black men, are equal. They are not equally white, equally British, equally intelligent, equally beautiful, or equally anything. If black men do not have rights, white men do not have rights; and if white men have rights, black men have rights. This is why Chief Justice Roger B. Taney, writing for the majority in *Dred Scott v. Sandford*,²¹ in effect denied that black persons were human persons. Without such a denial Justice Taney could not have deprived the black man of rights without depriving the white man as well. As usual, Lincoln saw clearly the implications of this decision:

Now, when [by means of the *Dred Scott* decision], you have succeeded in dehumanizing the Negro; when you have put him down and made it forever impossible for him to be but as the beasts of the field; when you have extinguished his soul, and placed him where the ray of hope is blown out in darkness like that which broods over the spirits of the damned; are you quite sure the demon which you have roused *will not turn and rend you?* What constitutes the bulwark of your own liberty and independence?²²

What, indeed, except the equal possession of rights? As Lincoln said in his well-known message to Congress, exhorting its members to vote for emancipation, it is only by “*giving freedom to the slave,*

19. This belief was set forth in general terms by Lincoln on several occasions: his “Speech at Peoria” in 1854; his “House Divided Speech” delivered at Springfield, Illinois in 1858; and his “Address at Cooper Institute” in 1860. In a letter, he exhibited his determination to fight for restoration of the Missouri Compromise and stated:

How can anyone who abhors the oppression of negroes, be in favor of degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation, we began by declaring that “all men are created equal.” We now practically read it “all men are created equal, except negroes.” When the Know-Nothings get control, it will read “all men are created equal, except negroes, and foreigners, and Catholics.” When it comes to this I shall prefer emigrating to some country where they make no pretense of loving liberty. . . .

Letter from Abraham Lincoln to Joshua F. Speed (Aug. 24, 1855), *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 335-36 (R. Basler ed. 1946) (emphasis omitted).

20. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 155 (W. Peden ed. 1972).

21. 60 U.S. (19 How.) 393 (1857).

22. A. Lincoln, Speech at Edwardsville, Illinois (Sept. 11, 1858), *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 473 (R. Basler ed. 1946) (emphasis in original).

[that we can] *assure* freedom to the *free*.”²³

In another speech attacking the *Dred Scott* decision, Lincoln also said that the Declaration of Independence—“our ancient faith”—was, and was intended to be, “a stumbling block to those who . . . might seek to turn a free people into the hateful paths of despotism.”²⁴ True to Lincoln’s word, a stumbling block it has proved to be.

I can make my point by contrasting our experience with slavery to that of Germany with Nazism. No one could rightly say that National Socialism, or Hitlerism, was un-German; there was no principle that made it so. Germany was a Christian nation, and Christianity has had a long history of anti-Semitism. Germany’s greatest poet, Goethe, in his novel, *Wilhelm Meister*, has the hero sketch the plans for a new society, a new Germany, at the conclusion of which he says, “Of course, there will be no room for Jews in this society.”²⁵ Although fascism, or Nazism, may have been inhuman, it was not un-German. The Declaration of Independence, however, makes slavery un-American. It is a “stumbling block” in the paths of despots. This explains why Alexander Stephens had to renounce it, *and* renounce its principal author—Thomas Jefferson.²⁶

I close by repeating my opening question. As a delegate to the Constitutional Convention of 1787, do you sign the Constitution that provides some hope for an enslaved people, or do you reject it because it is not perfect in its compromise with the slave power? Do you reject it and, by so doing, consign ninety-seven percent of black people to states that do not recognize the injustice of slavery?

The answer is not easy; but, I submit, it is clear.

23. A. Lincoln, Annual Message to Congress (Dec. 1, 1862), reprinted in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 688 (R. Basler ed. 1946) (emphasis in original).

24. A. Lincoln, Speech at Springfield, Illinois (June 26, 1857), reprinted in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 361 (R. Basler ed. 1946).

25. J. GOETHE, WILHELM MEISTER 155 (1795).

26. H. CLEVELAND, *supra* note 18, at 717-29.